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6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8

9 In re) Bankruptcy Case
10 GARY A. BOYD and KAREN M. BOYD,) No. 95-32824-TDM
11 Debtors.) Chapter 7
12)
13 EDWARD F. TOWERS, TRUSTEE,) Adversary Proceeding
14 Plaintiff,) No. 98-3113-DM
15 v.)
16 GARY A. BOYD and KAREN M. BOYD,)
17 Defendants.)
18

19 MEMORANDUM DECISION

20 On February 19, 1999, Gary and Karen Boyd ("Debtors") filed a
21 motion to dismiss the complaint of the Chapter 7 trustee, Edward
22 Towers ("Trustee"), for recovery of post-petition transfers, for
23 revocation of discharge and for declaratory relief regarding
24 Debtors' claim of exemption ("Complaint"). A hearing on the
25 motion to dismiss was held on March 26, 1999; Iain A. Macdonald,
26 Esq. appeared on behalf of Debtors and Dennis D. Davis, Esq.
27 appeared on behalf of Trustee. At the hearing, the court
28 requested additional briefing from the parties. Trustee filed his
supplemental brief on April 5, 1999 and Debtors filed their

1 supplemental brief on April 8, 1999. For the reasons stated
2 below, the court will grant the motion to dismiss with leave to
3 amend the complaint.

4 **I. Background**¹

5 On or about August 1, 1995, Debtors filed their joint Chapter
6 7 voluntary petition. Approximately four months earlier (in April
7 1995), Debtor Gary Boyd was injured by a fork lift operated by an
8 employee of Home Depot USA, Inc. ("Home Depot"). When Debtors
9 filed their Chapter 7 petition, they held a cause of action
10 against Home Depot for physical, emotional and financial injuries,
11 but had not yet filed a lawsuit against Home Depot. Debtors
12 failed to disclose the existence of their claims against Home
13 Depot as an asset in their sworn schedules.

14 The Chapter 7 case was closed as a no-asset case on February
15 7, 1996; one week later, on February 14, 1996, Debtors filed a
16 state court lawsuit against Home Depot. Thereafter, on or about
17 August 20, 1997, Debtors and Home Depot reached an agreement
18 whereby Home Depot paid \$700,000 in settlement of the personal
19 injury, property damage and loss of consortium claims. After
20 payment to their state court litigation counsel, Debtors retained
21 approximately \$410,000.

22 Eventually, the United States Trustee discovered the
23 existence of Debtors' claims against Home Depot and moved to
24 reopen the Debtors' case. The case was reopened on February 10,
25 1998, and on March 3, 1998, Debtors filed an amendment to their
26 schedules disclosing the existence of the claim and the settlement
27 of it, and exempting the personal injury portion of the claim. In
28 their Amended Schedule C, Debtors stated:

1 Debtors amend their schedule of exemptions to claim, as
2 fully exempt pursuant to California Code of Civil
3 Procedure § 704.140, the personal injury claim set forth
4 on Amended Schedule B.

5 In their Amended Schedule B, Debtors disclosed only:

6 An unliquidated claim for damages against Home Depot,
7 U.S.A., Inc., a Delaware corporation and Mark Zimmerman,
8 resulting from accident occurring on or about April 18,
9 1995. Claim unliquidated on date of bankruptcy.
10 Although settled on or about August 22, 1997, for the
11 sum of \$700,000.

12 Debtors exempted only their personal injury portion of their
13 claims against Home Depot; Debtors did not claim as exempt any
14 claim for property damage, for loss of wages or for loss of
15 consortium.

16 Three days after Debtors filed their amended schedules and
17 exemptions, Trustee served an objection to the claim of exemption
18 on Debtors' counsel. The Trustee prepared the objection for
19 filing with the court; even though the objection was prepared and
20 served well within the deadline for objections to exemptions, the
21 court did not receive its copy until well after the deadline.
22 Consequently, the objection was not timely filed with the court.

23 Subsequently, on April 21, 1998, Trustee filed the Complaint,
24 seeking denial of the exemption, recovery of the \$700,000 in
25 settlement proceeds pursuant to 11 U.S.C. §§ 549 and 550, and
26 revocation of Debtors' discharge.

27 **II. Discussion**

28 **A. Trustee's Objection to Debtors' Exemption of Their Personal Injury Claim is Time-barred, Although Trustee is Entitled to Valuation of Settlement to Determine Amount of Non-exempt Property Damage and Other Claims.**

1. Trustee's Objection to Exemptions Is Time-Barred

Trustee's third claim for relief in the Complaint seeks

1 declaratory relief regarding the amended exemptions filed by
2 Debtors. Federal Rule of Bankruptcy Procedure 4003(b) requires a
3 trustee to file objections to exemptions within thirty days of the
4 filing of an amendment to a debtor's list of exemptions. The
5 United States Supreme Court has strictly construed this filing
6 requirement, essentially treating Rule 4003(b) as a jurisdictional
7 statute of limitations. See Taylor v. Freeland & Kronz, 503 U.S.
8 638 (1992) (failure of trustee to file an objection within time
9 period of Rule 4003(b) resulted in allowance of claimed exemption,
10 even where objection was otherwise meritorious and valid).
11 Timely filing requires actual receipt of the pleadings by the
12 clerk of court. See Cooper v. City of Ashland, 871 F.2d 104, 105
13 (9th Cir. 1989) (when papers are mailed to clerk's office, filing
14 is complete when papers are received by clerk); see also Fed. R.
15 Bankr. P. 5005(a) (documents required to be "filed" shall be filed
16 with the clerk in the district where the main bankruptcy case is
17 pending). To the extent Rule 4003(b) establishes a statute of
18 limitations for objections, the requirement of a "filing" must be
19 strictly enforced. See Lee v. Dallas County Bd. Of Educ., 578
20 F.2d 1177, 1178 n.1 (5th Cir. 1978) (compliance with a filing
21 requirement is not satisfied by mailing the necessary papers
22 within the allotted time; the papers must be filed by the clerk
23 within the filing period specified in the applicable rule or
24 order); see also Eubank v. Strickland (In re Strickland), 50 B.R.
25 16, 17 (Bankr. M.D. Alab. 1985) (plain language of Fed. R. Bankr.
26 P. 4007© states that nondischargeability complaints must be
27 "filed" within certain time period; depositing pleading in mail
28 was not sufficient "filing"). Because Trustee did not timely file

1 his objection to the amended exemption, Debtors may retain their
2 exemption in the personal injury portion of their claims against
3 Home Depot, as set forth in their amended schedules.

4 Trustee argues that because Debtors received "actual notice"
5 of the objections to exemptions when they were timely served with
6 the written objections, Trustee has timely objected to the amended
7 exemption. Trustee cites several cases (most of which were
8 decided prior to Taylor) in support of his "actual notice"
9 argument. In each of these cases, however, the document providing
10 the actual notice (i.e., a motion for relief stay containing an
11 objection to exemption, an objection that did not comply with
12 local rules, etc.) was timely filed. The document setting forth
13 the objection in this case was not timely filed.²

14 2. Debtors Did Not Need Leave of Court to File Amended
15 Exemptions

16 Trustee contends that this Court should disregard the amended
17 Schedule C that declares the personal injury claim as exempt
18 because Debtors did not obtain leave of court to file their
19 amendments. Trustee cites Fed. R. Bankr. P. 1009(a), which
20 provides that a "voluntary petition, list, schedule, or statement
21 may be amended by the debtor as a matter of course at any time
22 before the case is closed." Under Trustee's interpretation of
23 this rule, Debtors lost their automatic right to amend once the
24 case was closed, even if the case had been re-opened; Trustee
25 asserts that Debtors were therefore required to obtain leave of
26 court before filing any amendments. The court interprets this
27 provision of Rule 1009 differently: as long as a case is open, a
28 debtor may amend its schedules and statements of affairs, until

1 closing. In any event, Rule 1009 does not affirmatively require a
2 debtor to file a motion to amend its schedules and statement of
3 affairs. Here, the case was open (re-opened) when Debtors filed
4 their amendments. The court believes that a motion for leave to
5 file amended schedules was not necessary.

6 3. Section 105 Does Not Extend Trustee's Deadline to
7 Object to Exemptions

8 Trustee argues that this court should utilize its powers
9 under 11 U.S.C. § 105 to disallow Debtors' exemptions. The
10 Bankruptcy Code and Rules, however, contain provisions
11 specifically governing allowance of and objections to exemptions.
12 See 11 U.S.C. § 522; Fed. R. Bankr. P. 4003. This court cannot
13 permit Trustee to attack Debtor's exemptions through section 105
14 instead of the more specific provisions and rules governing
15 exemptions. Seaport Automotive Warehouse, Inc. v. Rohnert Park
16 Auto Parts, Inc. (In re Rohnert Park Auto Parts, Inc.), 113 B.R.
17 610 (9th Cir. BAP 1990) (the court's power under section 105 is
18 limited; "while endowing the court with general equitable powers,
19 section 105 does not authorize relief inconsistent with more
20 specific law.").

21 4. Trustee is Entitled to Valuation of Settlement

22 Nevertheless, even though Trustee did not timely file his
23 objection to the exemption, Trustee is entitled to a valuation of
24 Debtors' settlement with Home Depot to determine how much of the
25 settlement payment is attributable to property damage or other
26 claims which are not the "personal injury" claims. Debtor
27 exempted only the "personal injury" claims; to the extent the
28 settlement includes amounts for other claims, those amounts have

1 not been declared exempt and continue to be property of the
2 estate. While "the uncontested, unambiguous listed exemption
3 stands," the Trustee is entitled file a motion for valuation of
4 the settlement proceeds and exemption, which is not time-barred.
5 Alderman v. Martinson (In re Alderman), 195 B.R. 106, 111 (9th
6 Cir. BAP 1996).

7 Trustee argues that the "personal injury" claim exemption is
8 ambiguous and subject to a motion for valuation as well. The
9 court disagrees. The date for determining the value of the
10 personal injury exemption is the bankruptcy petition date. Rigby
11 v. Hall (In re Hall), 1 F.3d 853, 855 (9th Cir. 1993). As of the
12 petition date, Debtors' claims against Home Depot were not the
13 subject of any pending action and were unliquidated. Pursuant to
14 Cal. Code Civ. P. § 704.140(a), the entire personal injury cause
15 of action was exempt as of the petition. Debtors' personal
16 injury claim is unambiguous, and is not subject to the limitations
17 of Cal. Code Civ P. § 704.140(b), inasmuch as the settlement did
18 not exist as of the petition date.³

19 **B. Trustee's Claim for Revocation of Discharge is Time-**
20 **barred.**

21 Trustee asserts that grounds exist to revoke Debtors'
22 discharge pursuant to 11 U.S.C. § 727(d)(1) and (d)(2).⁴ An
23 action under subsection (d)(1) must be filed within one year of
24 the granting of the discharge. An action under subsection (d)(2)
25 must be filed within one year of the granting of the discharge or
26 before the case was closed, whichever occurs later. See 11 U.S.C.
27 § 727(e)(1) and (2).⁵ The discharge in this case was granted on
28 January 27, 1996, and the case was closed on February 7, 1996.

1 The Complaint was filed on April 21, 1998, more than two years
2 later. It is therefore time-barred.

3 Trustee contends that Debtors' dishonest conduct in failing
4 to disclose its claim against Home Depot equitably tolled the
5 limitations set forth in section 727(e)(1) and (2); alternatively,
6 Trustee argues that the case was not "closed" for the purposes of
7 section 727(e)(2), because it was not finally administered. As
8 acknowledged by the Trustee in his supplemental brief, the courts
9 holding that a case is not "closed" for section 727(e) purposes if
10 assets have been omitted from the original schedules are resorting
11 to "intellectual gymnastics" and are in effect applying the
12 doctrine of "equitable tolling." Most courts, however, have held
13 that "equitable tolling" does not apply to section 727(d) actions.
14 Davis v. Johnson (In re Johnson), 187 B.R. 984, 988 (Bankr. S.D.
15 Cal. 1995) (setting forth list of cases refusing to apply
16 equitable tolling to section 727(d) actions). The court finds the
17 majority cases to be persuasive, and will not apply the doctrine
18 of "equitable tolling" in this case. Trustee's claim for
19 revocation of discharge will therefore be dismissed.

20 **C. The Court Will Allow the Trustee to Amend His Complaint**
21 **to Seek Turnover of Any Settlement Proceeds Attributable**
22 **to Non-Personal Injury Claims**

23 As set forth in ¶ II, A, supra, the court will recognize
24 Debtors' claim of exemption in the personal injury cause of
25 action. To the extent the settlement proceeds are directly
26 attributable to the personal injury claims, they are no longer
27 property of the estate and are not subject to any avoidance
28 action. However, with respect to that portion of the settlement
funds attributable to property damage or other non-personal injury

1 claims, Trustee is entitled to amend his complaint to seek
2 turnover of such funds. He cannot, however, maintain an avoidance
3 claim under section 549 and section 550, because there was no
4 "transfer." The Debtors simply retained property that would have
5 been property of the estate; they did not transfer the property to
6 themselves.⁶ Under Trustee's interpretation of sections 549 and
7 550, Debtors were both the transferees and the transferors. If
8 so, no transfer occurred and Trustee cannot state a claim for
9 relief under section 549 or 550. He can, however, use this
10 adversary proceeding to seek a turnover from the Debtors of any
11 nonexempt portion of the Home Depot settlement proceeds.

12 **III. Disposition**

13 Counsel for Debtors should prepare an order consistent with
14 this Memorandum Decision. Counsel should submit the order within
15 ten days of the date of service of this Memorandum Decision and
16 should comply with B.L.R. 9021-1 and 9022-1. The order should
17 provide for dismissal of this adversary proceeding, subject to
18 leave to amend the complaint to recover nonexempt proceeds within
19 twenty days of the order. The order should also set a status
20 conference on this adversary proceeding for July 30, 1999 at 1:30
21 P.M.

22 Dated: May __, 1999

23 _____
Dennis Montali
24 United States Bankruptcy Judge
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27 1. Many of the facts set forth in this section are recited in the
28 Complaint, the allegations of which the court considers true for
the purposes of this motion to dismiss. Jenkins v. McKeithen, 395
U.S. 411, 421 (1969); Arbabian v. BP America, 898 F.Supp. 703, 707

1 (N.D. Cal. 1995) ("For purposes of a motion to dismiss under Rule
2 12(b)(6), a complaint is construed in a light most favorable to
the plaintiff and all properly pleaded factual allegations are
taken as true.").

3
4 2. The objections to Debtors' exemptions appear to be
substantively valid, particularly the allegation that Debtors are
5 precluded from claiming the cause of action exempt because of
their fraud in secreting it from the trustee; if the objections
had been timely filed, they might well have been sustained.

6
7 3. Section 704.140(a) of the California Code of Civil Procedure
exempts a cause of action for personal injury. Section 704.140(b)
8 exempts a settlement or award for a personal injury. On their
petition date, Debtors held a cause of action, not an award or
9 settlement. Thus, the entire cause of action is exempt under
section 704.140(a). See In re Rita Marie Carr, Case No. 92-12222,
10 *Memorandum of Decision* issued by Jaroslovsky, J. (August 16, 1994)
(available on court's website at www.canb.uscourts.gov).

11 4. Section 727(d) of the Bankruptcy Code provides:

12 (d) On request of the trustee, a creditor, or the
13 United States trustee, and after notice and a hearing,
the court shall revoke a discharge granted under
14 subsection (a) of this section if -

15 (1) such discharge was obtained through the fraud
of the debtor, and the requesting party did not
16 know of such fraud until after the granting of such
discharge;

17 (2) the debtor acquired property that is property
of the estate, and knowingly and fraudulently
18 failed to report the acquisition of or entitlement
to such property, or to deliver or surrender such
19 property to the trustee; or

20 (3) the debtor committed an act specified in
21 subsection (a)(6) of this section.

22 5. Section 727(e) of the Bankruptcy Code provides:

23 (e) The trustee, a creditor, or the United States
trustee may request a revocation of a discharge -

24 (1) under subsection (d)(1) of this section within
one year after such discharge is granted; or

25 (2) under subsection (d)(2) or (d)(3) of this
26 section before the later of -

27 (A) one year after the granting of such
28 discharge; and

1 (B) the date the case is closed.

2 6. But see, In re Signorelli, 113 B.R. 781, 782 (Bankr. S.D. Fla.
3 1990) (motion for turnover of property of the estate sustained
4 where debtors' post-petition purchase of real property "... is, in
essence, a post-petition transfer of property of the estate
pursuant to the provisions of 11 U.S.C. section 549....")

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